Supreme Court, U.S.
FILED
DEC 15 2005
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No. 05-6651

IN THE SUPREME COURT OF THE

UNITED STATES

JOHN CUNNINGHAM,

Petitioner,

v.

THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION FIVE

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

I. CERTIORARI IS APPROPRIATE TO DECIDE WHETHER CALIFORNIA'S DETERMINATE SENTENCING LAW, BY PERMITTING SENTENCING JUDGES TO IMPOSE ENHANCED SENTENCES BASED ON THEIR DETERMINATION OF FACTS NOT FOUND BY THE JURY OR ADMITTED BY THE DEFENDANT, VIOLATES THE SIXTH AND FOURTEENTH AMENDMENTS.

Mr. Cunningham has urged the Court to grant his Petition for Writ of Certiorari for two related reasons: (1) to decide whether California's Determinate Sentencing Law (the "DSL"), by allowing judges to impose aggravated sentences based on factual determinations not made by the jury or admitted by the defendant, violates the Sixth and Fourteenth Amendments, and (2) to resolve the split of authority which has developed in the state courts in the wake of *Blakely v. Washington*, 542 U.S. 296, 125 S.Ct. 2531 (2004), and *United States v. Booker*, ___ U.S. ___, 125 S.Ct. 738 (2005), regarding the application of these cases to sentencing schemes just like California's DSL. In addition, Mr. Cunningham explained that his case presents an excellent vehicle for settling the constitutionality of the DSL.

The State does not dispute the importance of the question presented to thousands of criminal defendants each year. Nor does it contest that this case affords an ideal opportunity to resolve this question. Rather, the State argues that the Court should deny certiorari because the

DSL does not violate the Sixth or Fourteenth Amendment, and because there is not actually a split of authority for this Court to resolve. Opposition at 3-13. If anything, however, the State has provided a strong argument for why the Court should grant certiorari in this case.

The primary thrust of the State's opposition is that the DSL, as recently clarified by the California Supreme Court in *People v. Black*, 35 Cal.4th 1238 (Cal. 2005), does not run afoul of *Blakely's* constitutional mandate. Opposition at 3-11. To this end, the State provides a fairly extensive explanation of *Booker* and *Black*, and argues that the imposition of the upper term, not the middle term, under the DSL constitutes the statutory maximum pursuant to *Blakely*. Opposition at 3-11. It then concludes: "Petitioner's allegation that the rule of *Blakely* was misapplied is not a compelling reason to grant certiorari." Opposition at 12. Implicit in this argument is that the Court should deny certiorari simply because the State does not believe the DSL offends the Constitution. Indeed, the Opposition in this regard is really nothing more than an argument on the merits of the issue, as contrasted with an explanation for why the issue presented is unworthy of certiorari. Yet, by highlighting the diametrically opposed views on this issue -- which division is also illustrated by the dissents in this case and in *Black*, and in the competing opinions of numerous other jurisdictions passing on the

validity of their determinate sentencing laws under *Blakely* -- the State has unwittingly presented a powerful rationale for why certiorari is appropriate.

As for the necessity of certiorari to resolve the split of authority in the state courts, the State denies that any split exists on the theory that the decisions cited do not conflict in their understanding and interpretation of *Blakely* and *Booker*:

> "Far from reflecting a divergence in the interpretation of *Blakely*, the decisions cited by petitioner merely analyze how *Blakely* and *Booker* apply to particular sentence systems. The sentencing systems of the cited states vary -- sometimes quite widely -- in their structure, language, and application. Even where different states appear to have facially similar sentencing systems, those systems can differ significantly in operation after the state courts construe the relevant statutes and rules applying to a particular case." Opposition at 12-13.

The State's position that no constitutionally significant division exists in the state courts need not distract this Court for long. Glaringly absent from the State's Opposition are any specifics as to how the determinate sentencing laws of the jurisdictions in question meaningfully vary from California's for purposes of a *Blakely* analysis. This is undoubtedly because they do not.

As relevant here, the common denominator of the sentencing schemes cited -- as with Washington state's sentencing scheme analyzed

in *Blakely* -- is that a judge is permitted to make factual findings in imposing a sentence longer than the maximum authorized by the jury's verdicts or the defendant's admissions. *See, e.g. State v. Natale*, 184 N.J. 458, 473, n.4, 878 A.2d 724 (N.J. 2005) [cataloguing various sentencing schemes which place a ceiling on sentences that can be imposed based on jury verdicts alone, but which allow for judicial factfinding to increase sentences up to maximum allowed by statute].) In *Natale*, the New Jersey Supreme Court has recently characterized the split that has emerged among the state courts as follows:

> "Courts in states with sentencing schemes similar to our own have reached varying conclusions regarding the impact of *Blakely, supra,* and *Booker, supra,* on presumptive sentencing. Some have held that when the jury verdict or guilty plea authorizes only a presumptive term, an increase in the sentence above the presumptive based on judicial findings violates the Sixth Amendment. [Citing *Smylie v. State*, 823 N.E.2d 679, 683 (Ind. 2005); *State v. Brown*, 209 Ariz. 200, 99 P.3d 15, 17-18 (Ariz. 2004); *State v. Shattuck*, 689 N.W.2d 785, 786 (Minn. 2004); *State v. Dilts*, 337 Or. 645, 103 P.3d 95, 98-100 (Or. 2004)]. Others, including the Supreme Court of California, have concluded that there is no Sixth Amendment impediment when a judge increases a sentence above the presumptive term, but within the statutory range, based on discretionary judicial findings. [Citing *People v. Black, supra,* 35 Cal.4th at 544; *Lopez v. People,* 113 P.3d 713, 730-731 (Colo. 2005); *State v. Gomez,* 163 S.W.3d 632, 658 (Tenn. 2005); *State v. Hughes*, 154 Wash.2d 118, 110

P.3d 192, 200 and n.3 (Wash. 2005)]." *State v. Natale, supra,* 184 N.J. at p. 482-483.)[1]

In fact, state high courts have even divided on whether to adopt or reject California's interpretation of *Blakely* and *Booker* as applied to a judge's factfinding discretion in imposing aggravated sentences. *See, e.g., State v. Natale, supra,* 184 N.J. at p. 466 [rejecting *Black's* interpretation]; *People v. Lopez, supra,* 2005 WL 3046661 at p. 9, 11-15 [adopting *Black's* interpretation]. Thus, the State's theory that no split exists among the state courts as to their interpretation of *Blakely* and *Booker* is fallacious, and therefore is no obstacle to this Court granting certiorari in this case.

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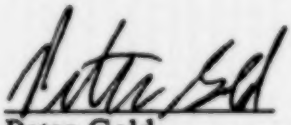
[1] Since the filing of Mr. Cunningham's petition, the Supreme Court of New Mexico has weighed in on the side of the California Supreme Court in *Black*, concluding that New Mexico's sentencing scheme does not violate the Sixth Amendment, but rather "illustrates an appropriate reliance on judicial discretion to sentence following a jury verdict, bench trial, or guilty plea." *People v. Lopez*, ___ P.3d ___, 2005 WL 3046661 at p. 15 (N.M. 2005) (decided Oct. 14, 2005).

CONCLUSION

The question presented here is one of great public importance which will not be resolved without intervention by this Court. In light of the untold number of criminal defendants whose constitutional rights are violated every day during sentencing and the stark split of authority which has developed in the state courts, delay offers no substantial advantages, but entails large costs. Since this case presents an ideal vehicle for addressing this matter, the Court should grant the Petition for Writ of Certiorari.

DATED: December 15, 2005.

Respectfully submitted,

By: 
Peter Gold
Attorney for Petitioner
John Cunningham

CERTIFICATE OF SERVICE

I, Peter Gold, am over 18 years of age. My business address is 2269 Chestnut Street, #124, San Francisco, California, 94123. I am not a party to this action.

On December 15, 2005, I served the within

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

upon the parties named below by depositing a true copy in a United States mailbox in Libertyville, Illinois, in a sealed envelope, postage prepaid, and addressed as follows:

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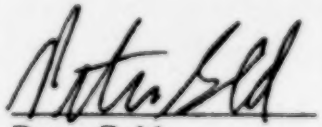
730 Harrison Street, Suite 201
San Francisco, CA 94107

Clerk of the Court
Court of Appeal
First District, Division Five
350 McAllister Street
San Francisco, CA 94102

John Cunningham
(retained for appellant)

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on December 15, 2005.



Peter Gold